SUPREME COURT, U. S.

No. 855

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In the Supreme Court of the United States

OCTOBER TERM, 1962

MAURICE SIGLER, WARDEN
LOUISIANA STATE PENITENTIARY, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, EX REL
EMILE WESTON, JR.,
Rspondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT, AND MOTION FOR LEAVE TO FILE

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INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	3
Reasons for granting the writ	4
Conclusion	23
Appendix	27

CITATIONS

CASES:

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L. Ed. 891, 55 ALR 2d 1055 ..... 4, 5, 10, 23

Eskridge v. Washington Prison Bd., 357 U.S. 214, 78 S.Ct. 1061, 2 L. Ed. 1269 4

Patterson v. Medberry, 290 Fd. 2d 275 7

In Re Faiola's Petition, 185 Fd Supp. 564, 362 U.S. 956, 80 S.Ct. 870, 4 L. Ed. 2d 872 9

State v. Weston, 232 La. 766, 95 So. 2d 305 ..... 3, 10, 11, 21

State v. Zenos, 138 La. 113, 70 So. 55 11

State v. Singley, 195 La. 519, 197 So. 218 11

State v. Lassiter, 198 La. 742, 4 So. 2d 814 11

State v. Barbarian, 225 La. 89, 72 So. 2d 306 11

Kirkendoll v. People, 331 P. 2d 809 12

PAGE

Petition of Patterson 317 P. 2d 1041 12

State v. Ella, 108 La. 553, 32 So. 476 13

State v. Downs, 50 La. Ann. 694, 23 So. 456 14

State v. Judge of Crim. Dist. Ct. 104, La. 63, 28 So. 902 14

State v. Swails, 226 La. 441. 76 So. 2d 523 14

State v. Daley, Nos. 46, 158-46, 160 S.Ct. of La. Nov. 5, 1962, unreported at this date 14, 15

State v. Brown, 236 La. 562, 108 So. 2d 233 15

State v. Cooper, 241 La. 757, 131 So. 2d 55 15

State v. Honeycutt, 218 La. 362, 49 So. 2d, 610, 612 15

State v. Haddad, 211 La. 337, 59 So. 2d, 411, 416 15

State v. Mastricovo, 221 La. 312, 59 So. 2d 403 15

State v. Guin, 212 La. 475, 32 So. 2d 895 16

State v. Burkhalter, 211 La. 342, 30 So. 2d 112 16

State v. Edwards, 232 La. 577, 94 So. 2d 674 16

State v. Martinez, 220 La. 899, 57 So. 2d 888 cert. den. 73 S.Ct. 58, 344 U.S. 843, 97 L. Ed. 656 16

State v. McMullen, 223 La. 629, 66 So. 2d 574 16

State v. Roy, 220 La. 1017, 58 So. 2d 323 16

Miller v. United States, 63 S.Ct. 187, 317 U.S. 192 17

State v. Goodman, 116 La. 388, 40 So. 771 17

State v. Williams, 213 La. 924, 35 So. 2d 856; 24A Corpus Juris Secundum, Verbo Crim. Law, Sec. 1775, p. 309 18

PAGE

U.S. v. Morgan, 74 S.Ct. 247, 346, U.S. 502, 98 L.Ed. 248 18

Lawn v. U.S., 78 S.Ct. 311, 355 U.S. 339, 2 L. Ed. 2d 321 18

Brown v. Allen, 73 S.Ct. 392, 344, U.S. 443, 97 L. Ed. 469 18

State v. Reed, 180 La. 741, 157 So. 547 18

State v. Paternostro, 224 La. 87, 68 So. 2d 767 20

Brown v. Allen, 73 S.Ct. 392, 419, 421, 422, 344 U.S. 443, 97 L.Ed 469 22

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Louisiana Constitutional Article 7, Section 10, (Appellate Jurisdiction, criminal) 5, 6, 7, 11, 13, 15, 23

Louisiana Revised Statutes Title 15, 498-503 ....2, 5, 6, 7, 13, 14, 15, 16, 17, 19, 20, 21, 23

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Maurice Sigler, Warden of Louisiana State Penitentiary and the State of Louisiana, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case on October 23, 1962 and December 20, 1962.

OPINIONS BELOW

The judgment of the United States District Court is unreported. A copy o the judgment and Reasons for Judgment is attached hereto as Appendix 1-A and 1-B. The judgment of the Circuit Court of Appeals is reported in 300 Fd. 2d 946. A copy of said judgment and the reasons for same is attached hereto as Appen-

dix 11-A and 11-B. A copy of the Petition for a Re-Hearing and the judgment thereon is attached hereto as Appendix 111-A and 111-B. A copy of the Motion for Extension of Time within which to file this petition for a Writ of Certiorari and the Order of this Honorable Court granting same is attached hereto as Appendix IV-A and IV-B.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 23, 1962. The judgment of the Circuit Court of Appeals refusing a rehearing was rendered on December 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

First: Under Louisiana Law relative to appeals in Criminal cases is it a violation of due process under the Fourteenth Amendment to fail to give an indigent defendant a complete transcript of the testimony, when, under the Constitution of Louisiana, the Supreme Court may only consider questions of law and not those of fact, and especially so when Louisiana Revised Statutes Title 15:499-503 provides a method whereby errors of law may be brought before the Supreme Court?

Second: Must a State provide an indigent defendant a transcript of the entire testimony and each and every incident of trial when same would not even be available to a person who could afford such a transcript when there are other means of affording to

every defendant, indigent or otherwise, adequate review?

Third: Is a defendant in every instance entitled to a complete transcript even when he has shown no reversible error which lacked adequate review by the appellate Court?

Fourth: Is a complete transcript necessary to afford effective appellate review under the appeal-only-on law system whereby defendant's objections to the ruling of the Court on questions of law are presented by bills of exception?

Fifth: Is a complete transcript of evidence necessary when under Louisiana Revised Statutes 15:504 the trial judge has authority to supply any unavailable portion by means of a per curiam, which is controlling?

Sixth: Is a complete transcript of the testimony necessary on questions of guilt or innocence when those matters are not passed upon by the appellate court and especially the testimony of a prospective juror whose testimony may be brought up by a bill of exception?

Seventh: Under the ruling of the Griffin decision must it not be shown that the defendant was prevented from obtaining an effective appellate review merely and solely because he was an indigent defendant who was unable to purchase a complete transcript of the evidence?

STATEMENT OF THE CASE

On June 18, 1956, Emile Weston was indicted

for aggravated rape. On October 17, 1956, after a full trial by jury he was convicted and sentenced to death. His conviction and sentence was affirmed on appeal to the Supreme Court of Louisiana. *State v. Weston*, 232 La. 766, 95 So. 2nd 305. A writ of habeas corpus was sought from the United States District Court for the Eastern District of Louisiana. The application was denied for the reason that state remedies had not been exhausted. The Court of Appeals for the Fifth Circuit affirmed. *Weston v. Sigler, Warden*, 262 F. 2nd 519. On certiorari the Supreme Court vacated the judgment of the Fifth Circuit Court and remanded the case to the district court with instructions to hear on the merits the application of Weston for a writ of habeas corpus. *Weston v. Sigler, Warden*, 361 U.S. 37, 80 S. Ct. 141, 4 L. Ed. 2nd 111. The district court heard the application and denied same. The matter was then appealed to the Court of Appeals for the Fifth Circuit and that Court reversed the district court and remanded the case for the reason that, according to the Court, Weston did not have on appeal the benefit of a complete transcript citing as its authority *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A.L.R. 2nd 1055; and *Eskridge v. Washington Prison Board*, 357 U.S. 214, 78 S. Ct. 1061, 2 L. Ed. 2nd 1269. Respondents applied for a rehearing which was denied on December 20, 1962.

An Application for an extension of time within which to apply to this Honorable Court for a Writ of Certiorari was filed and an order was issued granting said motion. (See Appendix IV-A and IV-B). The

matter is now before this Court on an Application for a Writ of Certiorari filed by Maurice Sigler, Warden, Louisiana State Penitentiary.

REASONS FOR GRANTING THE WRIT

I.

This matter presents a serious question involving the decisions of this Honorable Court in the case of *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A.L.R. 2d 1055, and *Eskridge v. Washington Prison Board*, 357 U.S. 214, 78 S. Ct. 1061, 2 L. Ed. 2d 1269, as applied to the statutes of the State of Louisiana relative to appeals in criminal cases, being L.R.S. 15:499-503, and Louisiana Constitution Art. 7, Sec. 10.

II.

The opinion of the Circuit Court of Appeals does not make it clear whether the Court held:

1. That the lack of stenographic transcript of Gaines' (the third juror's) testimony deprived the defendant of his constitutional right to equal treatment,

   OR

2. That the lack of a complete transcript of all the proceedings, including even that evidence not relating to the bills of exception reserved by defendant, deprived defendant of his constitutional right to equal treatment.

In the determination of these two issues, two main questions are presented:

A. Does *Griffin v. Illinois* require the furnishing of a complete transcript to indigent defendants in all cases? As will be hereinafter shown, the Griffin case itself clearly answers this question in the negative, holding that where other means of affording effective appellate review have been provided an indigent defendant, he is not entitled to a complete transcript.

B. Since Griffin recognizes the existence of means of affording an effective appellate review other than a complete transcript, was the defendant in the instant case provided adequate means under the law of Louisiana for an effective appellate review of reversible error? As will be shown hereinafter, the method provided by LSA 15:498-503, which was used by defendant in the instant case, presented all the evidence that the appellate court needed for a full appellate review of the errors of which the defendant complained.

III.

The Court of Appeals is in error in holding that the Griffin and Eskridge cases establish the rule that a state which provides for criminal appellate review must afford indigent appellants any and all incidents of appeal which are available to persons who can pay.

IV.

The Circuit Court of Appeals either misunderstood the ruling in the Griffin case or has unintention-

ally misapplied the effect of this decision to the Louisiana procedure for appeals in criminal matters as provided for by R.S. 15:499-504.

V.

The Circuit Court of Appeals failed to consider the Louisiana Bill of Exception method in light of the jurisdiction of the Supreme Court of Louisiana in appeals on criminal matters as provided in the statutes quoted above and the Louisiana Constitution, Article 7, Section 10.

ARGUMENT ON REASONS FOR GRANTING WRIT

I.

This matter presents a serious question involving the decisions of this Honorable Court in the Griffin and Eskridge cases for the reason that, if the decision of the Circuit Court of Appeals is upheld, then that part of Article 7, Section 10 of the Constitution of Louisiana will be made meaningless and in fact declared unconstitutional, or at least, ineffective. We do not believe that the Court intends to strike from our constitution that provision dealing with the appellate jurisdiction of the Supreme Court in criminal matters. Also, those sections of Louisiana Revised Statutes Title 15:498-503, would also be rendered meaningless.

II.

The court is in error in holding that the Griffin and Eskridge cases establish the rule that a state which provides for criminal appellate review must afford

indigent appellants any and all incidents of appeal which are available to persons who can pay.

The Griffin decision holds that an incident of appeal which is available to a person who can pay must be afforded to an indigent defendant provided the incident of appeal is necessary for an effective appellate review.

The opinion is therefore in error in holding that the Griffin, Eskridge, and Medberry cases stand for the proposition that an indigent appellant is entitled to a complete transcript of the trial proceedings free of charge in every case.

What these cases do hold is that a free transcript must be furnished when requested if it is the only means of affording effective appellate review. If effective appellate review is afforded by some means other than a complete transcript, then the failure to furnish a complete transcript is not fatal. *People v. Edelson*, 172 N.Y.S. S.2d 767, cert. den. 359 U.S. 1014, 79 S. Ct. 1153; *People v. Pollino*, 156 NY.S. 2d 300 cert. den. 355 U.S. 966, 78 S. Ct. 558.

In the Griffin case, the court said:

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanding bills of exceptions or other methods of reporting trial proceedings could be used in some cases . . ."

It should be noted that in Griffin, the Supreme Court of the United States singled out bystanders' bills of exceptions as an acceptable method of reporting trial proceedings in lieu of the complete transcript method. This is substantially what is provided for in Louisiana criminal procedure, and what was used in the case at bar. (L.S.A. 15:498-504). See 25 U. Chicago L. Rev. 162-165, 172.

In the Eskridge case, no record whatever was furnished on appeal, and the State of Washington admitted both the substantial nature of the alleged trial errors and the fact that the defendant could not effectively prosecute his appeal unless his motion for a free transcript was granted.

In the Medberry case, wherein no record whatever was furnished on appeal, the court held that "a state upon a timely request must furnish an indigent defendant in a criminal case with a record on appeal sufficient for an adequate appellate review of his conviction." Again, the test applied is whether the record furnished is sufficient to afford the defendant effective appellate review, and, as clearly pointed out in the Griffin case, a complete transcript is not the only method of providing effective appellate review.

The all-embracing principle established by the instant decision will have the effect throughout the United States of nullifying any conviction because of the mere absence of a complete transcript even though the defendant was not by such absence prejudiced and had been afforded an effective appellate review.

This is not what the Griffin, Eskridge, and Medberry cases teach. In all of these cases the State admitted the substantiality of the trial errors and the necessity of the transcript in order for the defendant to obtain an effective appellate review of such errors. See In re Faiola's Petition, 185 F. Supp. 564, 572, cert. den. 362 U.S. 956, 80 S. Ct. 870, 4 L. Ed. 2d 872. The holdings of these cases, therefore, limit the fatal effect of the absence of a complete transcript to those cases in which such absence prejudiced the defendant by depriving him of an adequate review of substantial error. In the case at bar, the appellate court had all of the record that was necessary for an adequate and effective appellate review.

III.

Defendant has shown no reason why a complete transcript is required on appeal. He points to no reversible error which lacked adequate review by the appellate court.

The defendant must point out reversible error which was denied appellate review because of the lack of a complete transcript, in order for the Griffin decision to apply. 24A Corpus Juris Secundum, Verbo Criminal Law, Sec. 1710 (1) p.35.

Griffin v. Illinois was predicated on a finding that the petitioner had raised serious trial errors, which the Court said it

> ". . . must . . . assume for purposes of this decision . . . would merit reversal . . . but for petitioner's inability to get . . . appellate review of

these errors solely because they were too poor to buy a stenographic transcript."

In the case at bar, the defendant has pointed out no prejudicial legal error committed during his trial which was denied appellate review because of the lack of a complete transcript.

Regardless of defendant's financial status, under Louisiana law, the only errors which were reviewable by the appellate court were those which defendant had reserved in his bills of exceptions. L.S.A. 15:502. The defendant reserved nine bills of exceptions, and that portion of the evidence to which his objections were directed or related was made part of his bills of exceptions. *State v. Weston*, 223 La. 766, 95 So. 2d 305. Thus the appellate court had before it all of the testimony that was necessary for it to review the errors complained of by the defendant.

The defendant has not pointed out how or where any testimony was lacking from the record which prevented the appellate court from reviewing the errors of which he complained.

With regard to defendant's Bill of Exceptions No. 8, in passing on defendant's objections to the overruling of his motion for a new trial, the appellate court said:

> "Bill No. 8, which was reserved to the overruling of appellant's motion for a new trial presents no question of law for review and is merely a reiteration of the complaints which we have already considered." *State v. Weston*, 223 La. 766, 95 So. 2d 305, 312.

Moreover, the appellate court will not disturb the trial court's denial of a new trial unless the record shows that the state failed to introduce any evidence of a fact essential to conviction. *State v. Xenos*, 138 La. 113, 70 So. 55.

If the record on appeal shows that there is some testimony adduced at the trial to support the conviction, no matter how little, the appellate court is without power to pass upon the question whether the evidence adduced was sufficient to support the verdict of guilty. *State v. Singley*, 195 La. 519, 197 So. 218, *State v. Lassiter*, 198 La. 742, 4 So. 2d 814; *State v. Barbarian*, 225 La. 89, 72 So. 2d 306. Louisiana Constitution Article VII, Section 10.

Hence, in the case at bar, all that the appellate court could pass upon with reference to Bill of Exceptions No. 8 was whether there was some evidence in the record to support the conviction.

In the case at bar, the evidence attached to and made part of Bills of Exceptions Nos. 1 through 7 showed affirmatively that there was some evidence introduced on the trial of the essential elements of the crime of which the defendant was convicted.

Inasmuch as there already was some supporting evidence in the record before the appellate court, a complete transcript was unnecessary in order to review defendant's complaint that there was a complete lack of supporting evidence in the record. In other words, it was apparent from the record in the posses-

sion of the appellate court that the record contained some evidence to support the conviction, and that a complete transcript could have added nothing. A complete transcript was irrelevant, as the question of insufficiency of evidence is not appealable.

In the case at bar, the furnishing of a complete transcript being a vain and useless thing and serving no purpose, the defendant was not entitled thereto. *Kirkendoll v. People*, 331 P. 2d 809; Petition of Patterson, 317 P. 2d 1041, wherein the court said:

> "If other matters are apparent from the record which would make the furnishing of a complete transcript a vain and useless thing, the trial court is justified in denying."

IV. & V.

Louisiana uses the bill of exception method because there is no criminal appeal in this state on questions of fact. Regardless of whether the defendant is rich or poor, appellate criminal review is afforded only on questions of law. Louisiana Constitution Article VII, Section 10.

Therefore, a complete transcript is not necessary in Louisiana to afford effective appellate review. Under the appeal-only-on-law system, it is necessary to preserve for appeal only those facts necessary to explain and support the defendant's objections to the rulings of the trial court on matters of law. This is the purpose of a bill of exceptions: to present questions of law for decision on appeal. L.S.A. 15:498; Comment,

6 La. L. Rev. 453; 24A Corpus Juris Secundum, Verbo Criminal Law, Section 1751 (1) p. 155, Sec. 1753, p. 188. In the perfection of the bill of exceptions for appeal, that portion of the evidence to which the defendant's objection has been directed or is related is transcribed and becomes part of the bill of exceptions. L.S.A. 15:499, *State v. Ella*, 108 La. 553, 32 So. 476, explains the Louisiana "bill of exception" method as follows:

> "The law contemplates the taking down, when an objection shall be made and a bill of exception reserved, 'of the facts upon which the bill has been retained.' . . . This may fairly be interpreted to mean that such testimony shall be taken down as may be necessary to enable this court to understand and properly rule upon the particular objection made and bill reserved, but it affords no support for the proposition that a defendant in a criminal trial may require the clerk or court stenographer to take down all the testimony adduced on behalf of the state in advance of possible objections or bills of exception to be made and reserved in the course of the trial. *State v. Downs*, 50 La. Ann. 694, 23 So. 456; *State v. Judge of Crim. Dist. Ct.*, 104 La. 63, 28 So. 902. And this view of the matter is recognized by counsel for the defendant, who admit that they had no right to have all the testimony for the state taken down."

Louisiana law, in L.S.A. 15:500 repeats this long established rule of Louisiana criminal procedure as follows:

> ". . . the accused is without right to have taken

> down any evidence except that which is necessary as a basis for his bill; he cannot require that any evidence be taken down, but may require only the recording of the facts necessary to support his bills of exception. *State v. Swails*, 226 La. 441, 76 So. 2d 523, *State v. Daley*, Nos. 46, 158-46, 160 Sup. Ct. of Louisiana, Nov. 5, 1962, unreported at this date; 24A Corpus Juris Secundum, Verbo Criminal Law Sec. 1710 (1), p. 35."

Furthermore, even if all the testimony were actually recorded and transcribed, L.S.A. 15:555 prohibits the appellate court from considering any portion thereof which is not a part of a bill of exceptions, as follows:

> ". . . provided further, that the said testimony shall be considered only in explanation of the bills of exceptions reserved during the trial on behalf of the accused."

Testimony which is not a part of a bill of exception cannot be considered by the appellate court although it is in the record. *State v. Brown*, 236 La. 562, 108 So. 2d 233; *State v. Cooper*, 241 La. 757, 131 So. 2d 55; *State v. Honeycutt*, 218 La. 362, 49 So. 2d 610, 612; *State v. Haddad*, 241 La. 337, 59 So. 2d 411, 416; *State v. Mastricovo*, 221 La. 312, 59 So. 2d 403.

Therefore, in Louisiana, a defendant with a complete transcript is not afforded a greater right of appeal than a defendant whose record on appeal contains only the testimony which is part of bills of exception.

In the recent opinion in *State v. Daley*, *supra*, the

Louisiana Supreme Court, discussing the Louisiana procedure of reporting only that evidence relating to bills of exceptions, said:

> "In this Court, defense counsel argue that the denial to appellant of the benefit of a written transcript in a criminal case because he is poor is violative of his fundamental right under the due process and equal protection clauses . . . Our jurisdiction in criminal cases extends to questions of law alone (see Section 10, Article 7 of the Constitution) for, by Section 9 of Article 19 of the Constitution, the jury in all criminal cases are the judges of the law and of the facts on the question of guilt or innocence 'having been charged as to the law applicable to the case by the presiding judge.' . . . Our law (R.S. 15:498-499, 500, 502, 503, and 555) provides an adequate means for all persons tried for crime, poor or rich alike, to have a full appellate review on questions of law by this Court."

The opinion in the instant case in effect holds that the bill-of-exception method does not place a defendant on an equal footing in his appeal with a defendant who has a complete transcript. If this holding is allowed to stand, the bill-of-exception method will have to be scrapped although it has been recognized as valid under the Griffin decision, as affording defendants an effective appellate review.

Under the jurisprudence of Louisiana, the trial judge's per curiam is controlling in the absence of evidence to the contrary. *State v. Guin*, 212 La. 475, 32 So. 2d 895; *State v. Burkhalter*, 211 La. 342, 30 So. 2d

112; *State v. Edwards*, 232 La. 577, 94 So. 2d 674; *State v. Martinez*, 220 La. 899, 57 So. 2d 888; cert. den. 73 S. Ct. 58, 344 U.S. 843, 97 L. Ed. 656; *State v. McMullen*, 223 La. 629, 66 So. 2d 574; *State v. Roy*, 220 La. 1017, 58 So. 2d 323.

L.S.A. 15:504 provides as follows:

> " 504. Per curiam appended to bill; certification in absence of per curiam
>
> "Whenever necessary the trial judge shall append to the bill of exceptions a per curiam in order that the appellate court may be fully informed as to all the circumstances pertaining to the questions raised by the bill. If the bill of exceptions requires no per curiam comment, the judge shall so certify at the foot of the bill at the time he signs the same."

When a portion of the transcript of evidence is unavailable, as in the case at bar, the trial judge has authority under L.S.A. 15:504 to supply the unavailable portion by means of a per curiam, which is controlling. This is what was done in the case at bar when the recording machine broke down. This would have occurred whether the defendant was rich or poor. The per curiam supplied the deficiency and "cured" the transcript.

In *Miller v. United States*, 63 S. Ct. 187, 317 U.S. 192, the use of a per curiam in lieu of a verbatim transcript was recognized, as follows:

> "Historically a bill of exceptions does not embody a verbatim transcript of the evidence but on the contrary, a statement with respect to the evidence

> adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses, as to what occurred at the trial, and in short from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked."

The remedy of a defendant who does not agree with the facts stated in the per curiam is to traverse it. If there are any facts stated in a per curiam which are injurious to the defendant or unwarranted, the defendant must remedy same by a motion for a new trial, and on the trial of the motion, he must traverse (produce contrary evidence) the facts stated in the per curiam; otherwise he admits and is bound by the facts stated in the per curiam. *State v. Goodman*, 116 La. 388, 40 So. 771; *State v. Williams*, 213 La. 924, 35 So. 2d 856; 24A Corpus Juris Secundum, Verbo Criminal Law, Sec. 1775, p. 309.

In the case at bar, the defendant made no attempt to traverse the per curiam and in fact accepted same as true and in lieu of the actual transcript by allowing it to go into the record uncontroverted. This principle would apply to this defendant whether he could pay for a transcript or not.

> "When an appellant accepts and files without objection a bill of exceptions which has been qualified by the trial judge, the appellant is bound by the qualification which is controlling." 24A Corpus Juris Secundum, Verbo Criminal Law, Sec. 1775, p. 309."

Defendant's failure to use a known remedy bars his subsequent reliance on the defaulted right. *U. S. v. Morgan*, 74 S. Ct. 247, 346 U.S. 502, 98 L. Ed. 248; *Lawn v. United States*, 78 S. Ct. 311, 355 U.S. 339, 2 L. Ed. 2d 321; *Brown v. Allen*, 73 S. Ct. 392, 344, U. S. 443, 97 L. Ed. 469.

In *State v. Reed*, 180 La. 741, 157 So. 547, relied on in the instant opinion, no per curiam was involved, and the transcript was so garbled and incomplete that it was impossible for the appellate court to review the objections of the defendant and the rulings of the trial court. The Louisiana Supreme Court in its opinion, stated:

> "While the judge in this case, pursuant to the request of defendant's counsel, ordered the testimony taken down, the work was so inexpertly done that the record as made up is not in such form as to enable this court to review the objections of defendant and the rulings of the trial judge thereon . . . And as disclosed on the hearing of the motion for a new trial, some of the bills reserved by defendant's counsel, together with the testimony, objections, rulings, and reasons, were entirely omitted by the stenographer . . . thereby making it impossible for their validty to be tested on appeal."

In other words, in the opinion of the appellate court, the defendant was denied effective appellate review because of the condition of the transcript.

The circumstances in the case at bar are different. The defendant had in fact a complete transcript before the appellate court on every objection and ruling of

which he has complained, and he was afforded effective appellate review on the basis of this record.

L.S.A. 15:555 applies only to the testimony of witnesses on the question of guilt or innocence.

The right given under the statute to obtain a complete transcript by paying for it applies only to a transcript of evidence given by witnesses on the question of guilt or innocence.

In the case at bar, the testimony of the prospective juror would not be covered by L.S.A. 15:555. The juror was not a witness on a question of guilt or innocence. The only statutory provisions for a transcript of the testimony of prospective jurors are R.S. 499-502 which provide for the taking of testimony as part of bills of exception. There is NO PROVISION in Louisiana law which gives a defendant with funds a greater right to a transcript of the testimony of prospective jurors than in indigent defendant. Poor and rich are on an equal footing under the provisions of L.S.A. 15:499-504 which are the ONLY articles that apply to the preservation of the testimony of prospective jurors.

State v. Paternostro, 224 La. 87, 68 So. 2d 767, tried in the Criminal District Court for the Parish of Orleans, has no application to the case at bar because it was decided under R.S. 13:1373 (B), a special statute which applies only to the Parish of Orleans, requiring a complete transcript of the testimony taken in criminal cases in Orleans Parish ONLY. The case at bar is not affected by the Orleans Parish statute as the crime was committed in another parish, to which

R.S. 13:1737 (B) does not apply. The Paternostro decision specifically stated that L.S.A. 15:555

> ". . . is without application to trials in the Criminal District Court for the Parish of Orleans." 68 So. 2d 768.

Therefore, the Paternostro decision is not authority for the proposition stated by the court in the instant opinion, that the right given under L.S.A. 15:555 is enforceable by mandamus. The Paternostro case did not involve L.S.A. 15:555, but was decided under L.S.A. 13:1373 (B).

Counsel for Emile Weston claims that the testimony of the prospective juror, Gains, was unavailable to him, thus making the transcript incomplete. He admits, however, in his Bill of Exception as to this prospective juror's viore dire and his answers were the same as those of the other two jurors who proceeded him and about whose answers he complains. (See Bill of Exception No. 4 in transcript of proceedings in State Court at Page 57 of said transcript and the per curiam thereto signed by the Trial Judge on Page 59 of the State Court proceedings).

The petitioner's rights under the Fourteenth Amendment of the Constitution of the United States have not been violated. The transcript of petitioner's trial which was furnished to the State Supreme Court, contained all of the matters which was subject to their review. To remand the case to the State Court, in order for him to obtain a complete transcript, would be ordering the impossible as a complete transcript

of this case could never be had, and if possible to supply, would serve no useful purpose.

The Griffin decision is controlling only if the defendant herein was prevented from obtaining an effective appellate review merely and solely because he was an indigent defendant who was unable to purchase a complete transcript of the evidence.

In order for strong local interest in the enforcement of criminal law to be subjected to the federal counterbalance of the general ideal of fundamental equality under the Griffin decision, it must appear that the defendant's financial situation, and that alone, denied him adequate appellate review of the prejudicial error.

Not only has the defendant failed to show any reversible error which was denied adequate appellate review because of the lack of a complete transcript, but he has also failed to show any relation between his financial condition and his failure to obtain a complete transcript.

The court erred in stating that the principal contention made by defendant in his appeal to the Louisiana Supreme Court as in indigent defendant was his inability to procure a complete transcript of the trial proceedings.

The defendant has never made a showing of indigency.

The defendant reserved nine bills of exception, which are the only matters that could be passed upon by the appellate court. L.S.A. 15:498, 499, 500, 502.

Not one of these bills involved any claim of defendant's indigent state and his inability to procure a complete transcript because of his indigence. Not one of the bills of exception shows the necessity for a complete transcript. *State v. Weston*, 232 La. 766, 95 So. 2d 305. This point was never raised by the defendant in his appeal to the Louisiana Supreme Court.

The defendant did not give the Louisiana Supreme Court a chance to pass upon the question of his right to or the necessity for a complete transcript.

Failure to raise a known and existing question of unconstitutional proceedings or action bars subsequent objection to conviction on the grounds. *Brown v. Allen*, 73 S. Ct. 392, 419, 421, 422, 344 U.S. 443, 97 L. Ed. 469, wherein the court said:

> "Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at the state trial and used later to support habeas corpus. State criminal proceedings would be unreasonably hampered. . . . The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 U.S.C.A. Sec. 2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal. To allow habeas corpus in such cir-

cumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime."

Although the federal court might be of the opinion that the furnishing of a complete transcript of the evidence is preferable to the "bill of exception" method used in Louisiana, it should not for this reason subvert the entire system of Louisiana criminal procedure. It should exercise its jurisdiction in the matter only if the defendant has actually been deprived of a right and treated unequally because of his poverty.

In the case at bar no question is presented under the principle of *Griffin v. Illinois*, if the Defendant's complaint is that he was not given a complete transcript because the recording machine broke down. The defendant's poverty did not prevent him from securing a complete transcript on appeal. Defendant's poverty had nothing to do with the breaking down of the recording machine during one juror's examination; nor did defendant's poverty cause his own failure to traverse the per curiam on the juror's statements.

Under the circumstances presented in the case at bar, Louisiana law accorded the defendant the same rights regardless of whether he was rich or poor.

The Griffin decision being based on the distinction between rich and poor made by a state law, is inapposite here.

CONCLUSION

In conclusion it is submitted that the Court of

Appeals has either misunderstood the ruling in the Griffin case or has unintentionally misapplied the effect of this decision to the Louisiana procedure for appeals in criminal matters as provided for by R.S. 15:499-504.

To apply the ruling in the Griffin case to the case at bar would have the effect of declaring Section 10, Article VII of the Constitution of Louisiana unconstitutional. This we do not think is the desire or intent of this Honorable Court. Accordingly it is submitted that the opinion of the Court of Appeals is in error and that a Writ of Certiorari should be granted herein.

Respectfully submitted by:

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

SCALLAN E. WALSH,
Assistant Attorney General.

TEDDY W. AIRHART, JR.,
Assistant Attorney General.

THOMAS W. McFERRIN,
Special Counsel.

DOROTHY W. WOLBRETTE,
Assistant Attorney General,
of Counsel.

APPENDIX NO. I-A

MINUTE ENTRY:
September 24, 1961
Christenberry, J:

No. 558
Miscellaneous

UNITED STATES OF AMERICA, EX REL
EMILE WESTON, JR., Petitioner

v.

MAURICE SIGLER, WARDEN OF THE
LOUISIANA STATE PENITENTIARY

This matter came on for trial on Application for Writ of Habeas Corpus on December 14, 1960, and was heard and submitted and the Court took time to consider;

NOW, therefore, after due consideration;

IT IS ORDERED that the Application for Writ of Habeas Corpus be, and the same is hereby, DENIED.

APPENDIX NO. 1-B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

No. 558 Miscellaneous

UNITED STATES OF AMERICA, EX REL.
EMILE WESTON, Petitioner

v.

MAURICE SIGLER, WARDEN OF THE
LOUISIANA STATE PENITENTIARY

REASONS FOR JUDGMENT

Petitioner, a Negro, is condemned to die for the rape of a white female. The crime with which he was charged occurred in the City of Baton Rouge on May 27, 1956. He was convicted by jury and his conviction was affirmed by the Supreme Court of the State of Louisiana. *State v. Weston* 232 La. 766, 95 So. (2d)305. Petitioner then filed a petition for a writ of habeas corpus in this Court.

This Court denied the petition, and the Fifth Circuit Court of Appeals affirmed the decision. *Weston v. Sigler*, 262 F. (2d)519. On certiorari to the Supreme Court of the United States, the judgment of the Court of Appeals was vacated and the case was remanded to this Court with instructions to hear on the merits the petitioner's application for a writ of habeas corpus *Weston v. Sigler*, 316 U.S. 37. Hearing was had on the merits, in conformity with the instructions given by the Supreme Court of the Unit-

ed States. The petitioner was produced in Court for the hearing, but elected not to testify. The hearing consisted solely of the arguments of counsel.

Petitioner contends that he has been denied due process and equal protection of the laws, which are guaranteed him by the Louisiana and the United States Constitutions. He states that he was unable to obtain a complete transcript of the proceedings in the trial court because of his financial inability, and that because of this the Louisiana Supreme Court:

(1) "Could not pass upon the insufficiency of or the lack of evidence to support the essential element in this case, namely that it was 'aggravated rape'," (See paragraph 11 of the petition).

(2) "Was unable to set aside the verdict and sentence due to the fact that relator was convicted upon his confession alone, which under the Constitution of this State and of the United States is prohibited." (See paragraph 11 of the petition).

The most serious contention before the Court is petitioner's charge that he has been denied due process of law because of the absence of a complete record of the proceedings in the trial court when his case was considered on appeal by the Louisiana State Supreme Court. He cites the case of *Griffin v. Illinois*, 351 U.S. 12, to support his contention that unless a defendant in a criminal trial is furnished with a complete transcript of the proceedings in the trial court for appellate review, at no cost to him if he is in in-

digent circumstances, his constitutional right to due process has been violated.

However, in applying the *Griffin Case* to this case it is necessary to compare the laws of Illinois with those of Louisiana. Under the law of Illinois, a convicted person can not obtain a bill of exceptions without paying the cost. (See cases cited in footnote No. 4 in *Griffin v. Illinois*, supra). Moreover, a defendant convicted in an Illinois State Court is entitled of right to have the appellate court review the facts and evidence of the case, i. e., the sufficiency of the evidence to uphold the verdict of the trial court, whether or not the evidence established his guilt beyond a reasonable doubt. This is permitted under the writ of error in Illinois. (111. Rev. Stat., 1955, ch. 38, Sec. 769.1); (See also the many cases found in *Smith-Hurd* Annotated Statutes of Illinois, under ch. 38, Secs. 771, 780 1/4, illustrating the power of the appellate courts to review questions of fact found on the whole record.)

Counsel for petitioner also cites the case of *Eskridge v. Washington Prison Board*, 357 U.S. 214, to substantiate this same point. However, as in Illinois, the Washington State appellate procedure provides for a review of a case on the facts as well as on the law. (See Remington Rev. Stat. Sec. 1736). Moreover, apparently Washington law has no provision whereby bills of exception are gratuitously furnished indigent defendants who are convicted in its state courts.

However, the criminal appellate procedure in Louisiana is different from that of Illinois or Washington. In Louisiana the appellate review of trial proceedings is confined to questions of law, and then only when they are reserved by a bill of exceptions, or an assignment of error, or by the Supreme Court's own motion to notice an error patent on the face of the record. The pertinent Louisiana Constitutional, legislative and jurisprudential pronouncements on this issue are as follows:

The Louisiana Constitution provides the scope of appellate review in criminal cases:

Art. 7 Sec. 10 of the Const. of 1921 (in Part).

"Appellate jurisdiction; criminal. The appellate jurisdiction of the Supreme Court shall also extend to criminal cases on questions of law alone, whenever the penalty of death, or imprisonment at hard labor may be imposed; or where a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed."

A. Methods by which an accused may obtain an appeal and review of this trial concerning issues of law under Art. 7 Sec. 10 of the La. Const. of 1921.

1. Bills of Exception

L.R.S. 15:555.

"Right of accused to have testimony taken down; provision for paying. The testimony of the witnesses on the question of guilt or innocence may be taken down under the supervision of the

court and in order to explain any bill of exception which may be taken by counsel for the accused, the accused shall have the right, if he chooses, to have all of the testimony so taken made a part of the transcript; provided, that any accused desiring to send up the testimony of all of the witnesses so taken, shall pay for the same, and provided further, that the said testimony shall be considered only in explanation of the bills of exception reserved during the trial on behalf of the accused."

L.R.S. 15:498

"Scope of bill of exceptions. The bill of exceptions is grounded on the objection made to the ruling of the court on some purely incidental question arising during the progress of the cause; and involves the correctness of the conclusions drawn by the court from the facts recited in the bill. A bill of exceptions is not necessary, however, when the ruling complained of is the overruling of a motion for a new trial based upon bills of exceptions reserved during the trial."

L.R.S. 15:499,

"Contents of bill of exception; recordation by clerk; duty of judge to sign. On the trial of all criminal cases, whenever a bill of exceptions shall be reserved to the ruling on any objection, the court shall at the time and without delay order the clerk or the stenographer to take down the facts upon which the objection and the ruling are based, together with the objection, the ruling and the reasons of the ruling, which statement, objection, ruling and reasons, so taken down, shall be preserved among the records

of the trial, and shall, when signed by the judge, constitute the bill of exceptions; provided that whenever a bill has been reserved the judge may be coerced by mandamus to sign the same."

L.R.S. 15:500.

"Circumstances and evidence to be shown by bill; evidence not to be taken down. The bill of exceptions must show the circumstances under which and the evidence upon which the ruling complained of is based; and the accused is without right to have taken down any evidence except that which is necessary as a basis for his bill; he cannot require that any evidence be taken down that appertains to guilt or innocence."

L.R.S. 15:502.

"Non-availability after verdict of errors not patent on face of record. No error, not patent on the face of the record, can be availed of after verdict, unless objection shall have been made at the time of the happening of such error and unless at the time of the ruling on the objection of bill of exceptions shall have been reserved to such adverse ruling."

L.R.S. 15:504.

"Percuriam appended to bill; certification in absence of per curiam. Whenever necessary the trial judge shall append to the bill of exceptions a per curiam in order that the appellate court may be fully informed as to all of the circumstances pertaining to the questions raised by the bill. If the bill of exceptions requires no per curiam comment, the judge shall so certify at

the foot of the bill at the time he signs the same."

L.R.S. 15:558.

"Questions not passed on by trial judge; province of appellate court. Unless the error is patent on the face of the record, an appellate court can not consider or determine any question which was not submitted to and passed upon by the trial judge.

2. Assignment of Errors:

L.R.S. 15:560.

"Meaning of assignment of errors; calling attention to errors without formal assignment. An assignment of errors is a written statement filed by the appellant in the appellate court, within ten days after the transcript is brought up, setting up some error of law apparent on the face of the record. It cannot be based upon any error disclosed by the aid of the evidence taken in the case. When the certificate of the officer who has made up the transcript shows that the transcript is complete, the appellant may at any time, orally or in brief, call the attention of the court to any error apparent on the face of the record, without making any formal assignment."

L.R.S. 15:503.

"Error patent on record defined. An error is patent on the face of the record when it is discoverable by the mere inspection of the pleadings and proceedings and without any inspection of the evidence, though such evidence be in the record."

State v. Daleo, 179 La. 516, 154 So. 437;

"'We are led to inquire whether there is error patent on the face of the record. This leads us to the inquiry, What is the record? A definition answers the question. It includes the caption in a criminal case, a statement of time and place of holding the court, the indictment or information with the indorsement, the arraignment, the plea of the accused, mention of the impaneling of the jury, verdict, and judgment of the court.'"

3. Motion of Supreme Court, itself.

State v. Toney, 205 La. 451, 17 So. (2d) 624
State v. Bankston, 159 La. 429, 105 So. 420
"As a matter of fact, this court is charged with noticing ex proprio motu such nullities or defects as may be apparent on the face of the record."

B. Methods by which a verdict may be set aside.

L.R.S. 15:421.

"Methods of setting aside verdict. When the error in the proceedings complained of is discoverable only by the taking of evidence, the method of setting aside the verdict is by means of a new trial; when the error is patent upon the face of the papers, the method is by an arrest of judgment or by an assignment of errors."

L.R.S. 15:509.

"Reasons for granting new trial. A new trial ought to be granted:

(1) Whenever the verdict is contrary to the law and the evidence; or

(2) Whenever the bills of exception reserved during the proceedings show error committed to the prejudice of the accused; or

(3) Whenever since verdict new material evidence has been discovered that could not have been discovered with reasonable diligence before or during the trial; or

(4) Whenever since verdict accused has discovered errors or defects in the proceedings to his prejudice that could not have been discovered with reasonable diligence before verdict; or

(5) Whenever, tho gh as a matter of legal right the accused may not be entitled to a new trial, yet the judge is of the opinion that the ends of justice would be served by the granting of a new trial."

L.R.S. 15:517.

"Basis for motion. A motion in arrest of judgment lies only for a substantial defect, patent upon the face of the record."

The record reflects that the Louisiana Supreme Court was furnished with all of the bills of exception taken by counsel for petitioner during the trial in the district court when the case was presented to it for review. All of the bills, with certain exceptions, had the testimony relating thereto, attached. The recording device used during the trial failed to transcribe the testimony relating to certain bills but the trial judge, a careful and experienced judge, appended his per curiam to those bills and set forth the facts and

circumstances upon which they were founded and the rulings thereon.

Thus it can readily be ascertained that the members of Louisiana's highest tribunal had access to all of the matter which was subject to their review when the case was adjudicated by that court. However, counsel for petitioner contends that there was no proof adduced at the trial which could support the conviction for the crime of aggravated rape, and that as a matter of law the conviction should be reversed.

At the hearing on this application, petitioner's counsel admitted that the victim of the attack testified before the jury that shortly before midnight while walking to her home in a sparsely populated section of Baton Rouge, following a visit to a friend, she was seized from behind by a Negro man who threw a red bandana handkerchief around her mouth and was pulled down alongside a drainage ditch; that, thereafter; the man began choking her, and told her that she knew what he wanted and that if she did not let him have it he would kill her; that she attempted to scream but her outcries were muffled by the red bandana handkerchief which the man placed over her mouth; that finally she did remove her panties and told him that if he was going to do it to "come on and lets get it over with", and that thereafter the act was committed. That she did give him a name, address and telephone number, but that they were not hers, but were a confection of her mind. That after the consummation of the act the Negro threatened her with death if she reported his act to the authorities.

Counsel for petitioner argues that because the woman removed her undergarment, did not make an outcry when an automobile passed on a road nearby and told the petitioner that if he was going to do it to "come on and lets get it over with" the corpus delicti of the offense charged had not been established.

At the trial the victim explained these circumstances by testifying that she was in great fear of physcial violence and harm, and that at no time did she voluntarily give her consent.

This was a question for the jury in the light of the time, the place, the parties involved and all of the surrounding circumstances.

The petitioner was not convicted upon his confession alone. On the contrary, ample evidence was produced at the trial which, if believed by the jury, established a corpus delicti and the guilt of the petitioner. Under Louisiana law, all that the state must produce at a criminal trial along with the confession of a defendant, in order to obtain a conviction is sufficient evidence, independent of that confession, which would establish the commission of the crime charged, *State v. Morgan*, 157 La. 962, 103 So. 278; *State v. Calloway*, 196 La. 496, 199 So. 403.

There was not sufficient reason adduced at the hearing which would justify this Court in issuing a writ of habeas corpus. On the contrary, the petitioner failed to meet the test set forth by the United States Supreme Court in the case of *Darr v. Burford*, 339

U.S. 200. In that case, Mr. Justice Read in speaking for a majority of the court, held:

> "A conviction after public trial in a state court by verdict or plea of guilty places the burden on the accused to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that in his prosecution the state so departed from constitutional requirements as to justify a federal court's intervention to protect the rights of the accused."

The petitioner's rights under the Fourteenth Amendment of the United States Constitution have not been violated. The transcript of petitioner's trial which was furnished to the members of the Louisiana State Supreme Court contained all of the matter which was subject to their review. If a complete record of the entire proceedings had been furnished to Louisiana's highest court, it could not have served any useful purpose.

The application for a writ of habeas corpus is denied.

New Orleans, Louisiana, January 9, 1962.

HERBERT W. CHRISTENBERRY

UNITED STATES DISTRICT JUDGE

APPENDIX NO. II-A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1961

No. 19402

D.C. Docket No. 558 Miscellaneous B.R.

THE UNITED STATES OF AMERICA,
EX REL EMILE WESTON, JR.,
Appellant,

v.

MAURICE SIGLER, WARDEN,
LOUISIANA STATE PENITENTIARY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

Before Cameron and Jones, Circuit Judges, and DeVane, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District

Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Maurice Sigler, Warden, Louisiana State Penitentiary, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

October 23, 1962

Issued:

CAMERON, Circuit Judge: "I dissent"

APPENDIX NO. II-B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19402

THE UNITED STATES OF AMERICA,
EX REL. EMILE WESTON, JR.,

Appellant,

v.

MAURICE SIGLER, WARDEN,
LOUISIANA STATE PENITENTIARY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(October 23, 1962)

Before CAMERON and JONES, Circuit Judges, and DeVANE, District Judge.

JONES, Circuit Judge: The relator, Emile Weston, Jr., has appealed from a judgment of the District Court of the Eastern District of Louisiana by which his application for a writ of habeas corpus was denied.

On June 18, 1956, Weston was indicted for rape. On October 17, 1956, he was convicted and sentenced to death. The conviction was affirmed on appeal to the Supreme Court of Louisiana. *State v. Weston*, 232 La. 766, 95 So. 2d 305. A writ of habeas corpus was sought from the United States District Court for the Eastern District of Louisiana. The application was denied on the ground that state remedies had not been exhausted. This Court affirmed. *Weston v. Sigler*,

Warden, 262 F. 2d 519. On certiorari the Supreme Court vacated the judgment of this Court and remanded the case to the district court with instructions to hear on the merits the application of Weston for a writ of habeas corpus. *Weston v. Sigler, Warden*, 361 U.S. 37, 80 S. Ct. 141, 4 L. Ed 2d 111. The district court has heard the application and denied it. We here review its action.

Under the law of Louisiana a person accused of a capital offense may ask a prospective juror whether he has conscientious scruples against returning a verdict for less than capital punishment in the event the evidence convinced the jury of the guilt of the accused. *State v. Weston, supra.* It was contended by Weston that three of the prospective jurors gave answers requring they be excluded on his challenge for cause. The Louisiana Court held that the prospective jurors were confused but not prejudiced. The testimony as to two of the prospective jurors was transcribed and was before the Supreme Court of Louisiana. The record of the third prospective juror was not before the court because the recording machine broke down. The Louisiana Supreme Court held there was no error because the trial judge stated that the prospective juror did not say that he could not qualify his verdict. But it seems to be the law of Louisiana that a person accused of crime is entitled to have a record of testimony with respect to matters on which bills of exception are predicated. In a case where a stenographer was unable to read her notes, the Supreme Court of Louisiana annulled a conviction and remanded for a

new trial. *State v. Reed*, 180 La. 741, 157 So. 547.

The principal contention here made by the appellant is that in his appeal to the Supreme Court of Louisiana, as an indigent appellant, he was unable to procure, at the expense of the State, a complete transcript of the trial proceedings. The position so taken, he asserts, is the doctrine of *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed 891, 55 A.L.R. 2d 1055, and *Eskridge v. Washington Prison Board*, 357 U. S. 214, 78 S. Ct. 1061, 2 L. Ed. 2d 1269. The appellee here, represented by the Attorney General of Louisiana, distinguishes the Griffin and Eskridge cases by saying that on the review by bill of exception under Louisiana procedure an indigent accused may get, at the expense of the State, a bill of exception and all pertinent testimony and evidence, whereas in the Griffin case, under Illinois law, the accused must find the funds to pay for the testimony and evidence; and in Eskridge, under the Washington law, the furnishing of a transcript is afforded as a matter of judicial discretion rather than as a matter of right. These arguments seemed convincing to the district court in which the habeas corpus proceeding was brought. The court noted the differences in the procedures in Illinois and Washington as compared with those of Louisiana and reached the conclusion that the Supreme Court of Louisiana had before it all of the record which was required to permit a review of the appellant's bill of exception. The application for habeas corpus was denied.

It is our view that the principle set forth in the

Griffin and Eskridge cases is much broader and far reaching than as construed by the district court. As we read these cases they stand for the proposition that where a state provides for an appellate review of a criminal conviction it must afford to indigent appellants all of the incidents of the appeal which might be had by those who could pay for them. See also *Patterson v. Medberry*, 10th Cir. 1961, 290 F. 2d 275. By a Louisiana statute it is provided:

> "The testimony of the witnesses on the question of guilt or innocence may be taken down under the supervision of the court and in order to explain any bill of exception which may be taken by counsel for the accused, the accused shall have the right, if he chooses, to have all of the testimony so taken made a part of the transcript; provided that any accused desiring to send up the testimony of all of the witnesses so taken, shall pay for the same, and provided further, that the said testimony shall be considered only in explanation of the bills of exception reserved during the trial on behalf of the accused." (L.S.A. 15:555)

This statute affords a right to those who have the funds to permit the right to be exercised. It is a right which the Louisiana courts will enforce by mandamus. *State v. Pasternostro*, 224 La. 87, 68 So. 2d 767. The right created by the statute is denied to those who are without the funds necessary to permit it to be enjoyed. In this class is the appellant. He has been denied equal protection of the law by the refusal of

the State of Louisiana to supply to him, without cost, a full transcript.

Our disposition of the case makes it unnecessary to consider any of the other questions which the appellant seeks to raise.

The judgment of the district court will be reversed and the case remanded. On remand the district court should enter such appropriate order as will allow the State a reasonable time to afford the appellant the full appellate review he would have been entitled to have upon a complete transcript, or to award him a new trial, and failing either of these the appellant should be discharged. *Dowd v. United States Ex Rel Cook*, 340 U.S. 206, 71 S. Ct. 262, 95 L. Ed. 215, 19 A.L.R. 2d 784.

REVERSED AND REMANDED.

CAMERON, Circuit Judge
"I dissent"

APPENDIX III-A

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 19,402

UNITED STATES OF AMERICA, EX REL.
EMILE WESTON, JR.,

Appellant,

v.

MAURICE SIGLER, WARDEN
LOUISIANA STATE PENITENTIARY, ET AL.,

Appellee.

PETITION FOR REHEARING

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

SCALLAN E. WALSH,
Assistant Attorney General.

TEDDY W. AIRHART, JR.,
Assistant Attorney General.

THOMAS W. McFERRIN,
Special Counsel.

DOROTHY W. WOLBRETTE,
Assistant Attorney General,
of Counsel.

APPENDIX III-A

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 19,402

UNITED STATES OF AMERICA, EX REL
EMILE WESTON, JR.,

Appellant,

v.

MAURICE SIGLER, WARDEN
LOUISIANA STATE PENITENTIARY, ET AL.,

Appellee.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Maurice Sigler, the respondent-appellee above named, presents this, his petition for a rehearing in the above numbered and entitled cause, and, in support thereof, respectfully shows:

I.

This Honorable Court, in its opinion of reversal herein failed to apply the law of Louisiana relative to appeals in criminal cases and failed to consider the Articles of the Criminal Code with reference to appellate procedure.

II.

The Court failed to show there was a denial of effective appellate review resulting to indigent defendant in order for denial of transcript to be fatal under the Griffin Decision.

III.

The Court failed to show any reversible error which required a complete transcript of the evidence on appeal.

IV.

The Court failed to recognize that bill of exception method as provided for under Louisiana Criminal Code affords defendant same rights on appeal as a complete transcript.

V.

The Court failed to recognize that the per curiam of the trial judge as to facts of juror's voir dire is conclusive, and that the correctness thereof was admitted by the defendant.

VI.

The Court erred in applying L.S.A. 15:555 to the case at bar but should have applied L.S.A. 15:-499, 500, 501, 502, 503 and 504.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for a rehearing be granted and that the judgment of the

District Court be, upon further consideration, affirmed.

Respectfully submitted by:

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

SCALLAN E. WALSH,
Assistant Attorney General.

TEDDY W. AIRHART, JR.,
Assistant Attorney General.

THOMAS W. McFERRIN,
Special Counsel.

DOROTHY W. WOLBRETTE,
Assistant Attorney General
of Counsel.

ARGUMENT

May it please the Court:

The opinion herein does not make it clear whether the Court holds:

(1) That the lack of stenographic transcript of Gaines' (the third juror's) testimony deprived the defendant of his constitutional right to equal treatment

OR

(2) That the lack of a complete transcript of all the proceedings, including even that evidence not relating to the bills of exception reserved by defendant, deprived defendant of his constitutional right to equal treatment.

It will therefore be necessary to present argu-

ments in this memorandum dealing with both possible holdings.

In the determination of the issues, two main questions are presented:

(1) Does *Griffin v. Illinois* require the furnishing of a complete transcript to indigent defendants in all cases? As will be hereinafter be shown, the *Griffin* case itself clearly answers this question in the negative, holding that where other means of affording effective appellate review have been provided an indigent defendant, he is not entitled to a complete transcript.

(2) Since *Griffin* recognizes the existence of means of affording an effective appellate review other than a complete transcript, was the defendant in the instant case provided adequate means under the law of Louisiana for an effective appellate review of reversible error? As will be shown hereinafter, the method provided by LSA 15:498-503, which was used by defendant in the instant case, presented all the evidence that the appellate court needed for a full appellate review of the errors of which the defendant complained.

I.

THE COURT FAILED TO APPLY THE LAW OF LOUISIANA RELATIVE TO APPEAL IN CRIMINAL CASES AND FAILED TO CONSIDER THE ARTICLES OF THE CRIMINAL CODE.

The Court in its opinion of reversal herein clearly

failed to apply the law of Louisiana, being L.S.A. 15:499-503, relative to appeals in criminal matters in that in Louisiana only questions of law may be reviewed by the Appellate Court and only then after a bill of exception has been reserved and perfected on the point of error relied upon. Under the Constitution of Louisiana, the Supreme Court reviews only questions of law and does not consider questions of fact.

II.

DENIAL OF EFFECTIVE APPELLATE REVIEW MUST RESULT TO INDIGENT DEFENDANT IN ORDER FOR DENIAL OF TRANSCRIPT TO BE FATAL UNDER GRIFFIN DECISION.

The Court is in error in holding that the *Griffin*[1] and *Eskridge*[2] cases establish the rule that a state which provides for criminal appellate review must afford indigent appellants *any* and *all* incidents of appeal which are available to persons who can pay.

The *Griffin* decision holds that an incident of appeal which is available to a person who can pay must be afforded to an indigent defendant *provided the incident of appeal is necessary for an effective appellate review.*

The opinion is therefore in error in holding that the *Griffin*,[1] *Eskridge*,[2] and *Medberry*[3] cases stand for the proposition that an indigent appellant is en-

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[1]351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891.
[2]357 U.S. 214, 78 S. Ct. 1061, 2 L. Ed. 2d 1269
[3]290 F. 2d 275.

titled to a complete transcript of the trial proceedings free of charge in every case.

What these cases do hold is that a free transcript must be furnised when requested *if it is the only means of affording effective appellate review.* If effective appellate review is afforded by some means other than a complete transcript, then the failure to furnish a complete transcript is not fatal. *People v. Edelson*, 172 N. Y. S. 2d 767, cert. den. 359 U.S. 1014, 79 S. Ct. 1153; *People v. Pollino*, 156 N.Y.S. 2d 300 cert. den. 355 U.S. 966, 78 S.Ct. 558.

In *Griffin*, the court said:

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, *it may be that bystanders' bills of exceptions* or other methods of reporting trial proceedings could be used in some cases . . ." (emphasis supplied).

In *State of Minnesota v. James*, 89 N.W. 2d 904, 906, cert. den. 358 U.S. 934, 79 S. Ct. 322, the Court said:

> "The question before us now is whether every indigent prisoner convicted of a felony has a right to a complete transcript of a trial simply for the asking. We do not so read the Griffin decision, nor do we believe that such was the intention of the legislature. Defendant in the case before us has been furnished a copy of the synopsis prepared by the trial court in connec-

tion with his commitment. It seems to us that that should be sufficient unless some good showing is made that it is inadequate to present the questions which defendant wishes to raise in attacking the conviction. While an indigent prisoner should be furnished such part of the transcript as is necessary to adequately present the questions which he in good faith wishes to have us review, the expense of a complete transcript should not be imposed upon the counties of this state where it is not necessary in order to present such questions. The proper procedure ought to be that a defendant who wishes a review by this court should, in his application to the trial court, indicate what questions he wishes to have us review and what part of the transcript is necessary in order to present such questions. If he raises a question as to the sufficiency of the evidence to sustain the conviction, it should be incumbent upon him to point out in what respect he believes the evidence is lacking. The court then can determine whether the entire transcript is necessary or whether a synopsis or an abridgment of the transcript will suffice. It may be that the judgment roll is all that is required. In such case, or in case less than the complete transcript will suffice, surely the counties should not be compelled to shoulder the burden of an unnecessary complete transcript or such parts of the transcript as will serve no useful purpose.

In the case now before us, no showing of any kind has been made as to the need for a transcript or what part of it is needed if an abridgment will do."

In *Grady v. Schneckloth*, 314 P. 2d 930, 931, 933, cert. den. 357 U.S. 939, 78 S. Ct. 1391, the Court said:

"Petitioner, now serving a term in the penitentiary for the crime of robbery, invokes the original jurisdiction of this court in habeas corpus upon the sole ground that *Griffin v. People of State of Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, requires the state to furnish him, free, a stenographic transcript of the entire proceedings at his trial for his proposed statement of facts on appeal. The Illinois law required the complete trial minutes as a prerequisite to appeal, but that is not so here. No showing is attempted of any necessity for such a statement of facts. In fact, no claim of necessity is made. The unequivocal basis is that *Griffin v. People of State of Illinois, supra*, compels it. We do not agree.

. . . Had petitioner made any showing of a necessity for a full copy of the minutes in his trial to be proposed by him in his statement of facts, the trial court would have ordered it, and if refused, such action could have been reviewed here. The Supreme Court of North Dakota in *State v. Moore, supra*, aptly stated the controlling principle in the following paragraph:

> 'The requirement, therefore, that an indigent defendant in his application to the court for a transcript, to be prepared at public expense, make some showing that the proceedings, upon which he asserts error, cannot be made a part of the record upon appeal without such transcript, is a reasonable one and does not discriminate

> against the defendant or deny his equal protection of the law.'
>
> This is a complete answer to all claims that an indigent defendant is entitled to a free statement under *Griffin v. People of State of Illinois, supra.*"

Writing on the limited effect of the Griffin decision, United States Circuit Judge Frederick G. Hamley opined as follows:

> "LIMITATION OF THE GRIFFIN RULE
>
> "Before discussing the broad implications of this decision, perhaps it would be well to note some of its limitations. Griffin did not hold that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. It was pointed out that the state appellate court may find other means of affording adequate and effective review, as by supplying a narrative statement of facts.
>
> "Taking advantage of this suggestion, the Supreme Court of Washington, in *Grady v. Schneckloth*, 51 Wash. 2d 1, 314 P. 2d 930, decided on September 5, 1957, held that where an indigent state defendant had prepared a narrative statement of facts which would have been sufficient to obtain a review, but failed to heed the suggestion of the Chief Justice that it be filed and certified, Griffin did not require the state to supply a free stenographic transcript. Substantially the same ruling was announced by the same court in *Ross v. Rhay*, 51 Wash. 2d 893, 318 P. 2d 975, decided December 12, 1957. Decisions to the same effect have

been rendered by the Supreme Court of Tennessee (*Beadle v. State*, Tenn., 310 S. W. 2d 157), and the Supreme Court of North Dakota (*State v. Moore*, N.D., 82 N.W. 2d 217).

"Nor does *Griffin v. People of State of Illinois* entitle an indigent defendant to a free transcript where it is determined by the appellate court that the appeal is frivolous. Mr. Justice Frankfurter made this very plain in his concurring opinion, say (351 U.S. at page 24, 76 S.Ct. at page 593):

> '. . . When a state not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent . . . .'

"This same view was expressed, by way of dictum, in *United States v. Fay*, 2 Cir., 247 F. 2d 665. In *Moy v. Bradley*, Ky., 306 S.W. 2d 296, decided by the Kentucky Court of Appeals, it was held that an indigent defendant was not entitled to a free record on appeal 'without specifying sound legal reasons why his conviction should be reviewed' . . . " 24 F.R.D. 75, 76-77 (1960)

See also 55 A.L.R. 2d 1075, 1078-1079 (1957); 6 L.Ed. 2d 1295n, Sec. 4(c) (1962); 24 A. Corpus Juris Secundum, Verbo Criminal Law Sec. 1710 (1), p. 35; 25 U. Chicago L. Rev. 143, 144, 146, 148, 163-165, 172.

It should be noted that in *Griffin*, the Supreme Court of the United States singled out *bystanders'*

bills of exceptions as an acceptable method of reporting trial proceedings in lieu of the complete transcript method. This is substantially what is provided for in Louisiana criminal procedure, and *what was used in the case at bar.* (L.S.A. 15:498-504). See 25 U. Chicago L. Rev. 162-165, 172.

In the *Eskridge* case, no record whatever was furnished on appeal, and the State of Washington admitted both the substantial nature of the alleged trial errors and the fact that the defendant *could not effectively* prosecute his appeal unless his motion for a free transcript was granted.

In the *Medberry* case, wherein no record whatever was furnished on appeal, the court held that "a state upon a timely request must furnish an indigent defendant in a criminal case with a record on appeal *sufficient for an edequate appellate review of his conviction.*" (emphasis supplied). Again, the test applied is whether the record furnished is sufficient to afford the defendant *effective appellate review*, and, as clearly pointed out in the *Griffin* case, a complete transcript is not the only method of providing *effective appellate review.*

The all-embracing principle established by the instant decision will have the effect throughout the United States of nullifying any conviction because of the *mere absence* of a complete transcript even though the defendant was not by such absence prejudiced and had been afforded an effective appellate review.

This is not what the *Griffin*, *Eskridge*, and *Med-*

berry cases teach. In all of these cases the State admitted the substantiality of the trial errors and the necessity of the transcript in order for the defendant to obtain an effective appellate review of such errors. See *In re Faiola's Petition*, 185 F. Supp. 564, 572, cert. den. 362 U.S. 956, 80 S.Ct. 870, 4 L. Ed. 2d 872. The holdings of these cases, therefore, limit the fatal effect of the absence of a complete transcript to those cases in which such absence prejudiced the defendant by depriving him of an adequate review of substantial error. In the case at bar, the appellate court had all of the record that was necessary for an adequate and effective appellate review.

III.

DEFENDANT HAS NOT SHOWN ANY REVERSIBLE ERROR WHICH REQUIRED A COMPLETE TRANSCRIPT OF THE EVIDENCE ON APPEAL.

Defendant has shown no reason why a complete transcript is required on appeal; He points to no reversible error which lacked adequate review by the appellate court.

In *People v. Lumpkin*, 158 N.Y.S. 2d 610, the New York Court said:

> "... 'This Court does not understand the Griffin decision ... to mean that an indigent defendant must be given a transcript of the minutes any time he asks for them. For what purpose does he want them? What legal remedy does he desire to enforce? Certainly he should not be

given the minutes merely because it might make interesting reading for him.' "

In *Ex Parte Powell*, 102 So. 2d 923, 925, 926 the Alabama Court said:

> "No question is present under the principle of *Griffin v. People of State of Illinois* . . . Powell has not shown here any question of fact which he seeks to have reviewed that would, if established in his favor produce a different result from that which obtained on his original trial."

See also *State of Minnesota v. James*, 89 N.W. 2d 904, and *Grady v. Schneckloth*, 314 P. 2d 930, quoted *supra*.

The defendant must point out reversible error which was denied appellate review because of the lack of a complete transcript, in order for the *Griffin* decision to apply. 24A Corpus Juris Secundum, Verbo Criminal Law, Sec. 1710(1) p. 35.

Griffin v. Illinois was predicated on a finding that the petitioner had raised serious trial errors, which the Court said it

> ". . . must . . . assume for purposes of this decision . . . would merit reversal . . . but for petitioner's inability to get . . . appellate review of those errors solely because they were too poor to buy a stenographic transcript."

In the case at bar, the defendant has pointed out no prejudicial legal error committed during this trial which was denied appellate review because of the lack of a complete transcript.

Regardless of defendant's financial status, under Louisiana law, the only errors which were reviewable by the appellate court were those which defendant had reserved in his bills of exceptions. L.S.A. 15:502. The defendant reserved nine bills of exceptions and that portion of the evidence to which his objections were directed or related was made part of his bills of exceptions. *State v. Weston*, 223 La. 766, 95 So. 2d 305. Thus the appellate court had before it all of the testimony that was necessary for it to review the errors complained of by the defendant.

The defendant has not pointed out how or where any testimony was lacking from the record which prevented the appellate court from reviewing the errors of which he complained.

With regard to defendant's Bill of Exceptions No. 8, in passing on defendant's objection to the overruling of his motion for a new trial, the appellate court said:

> "Bill No. 8, which was reserved to the overruling of appellant's motion for a new trial presents no question of law for review and is *merely a reiteration of the complaints which we have already considered.*" *State v. Weston*, 223 La. 766, 95 So. 2d 305, 312.

Being merely a reiteration of the complaints already considered in Bills Nos. 1 through 7, Bill No. 8 did not require any transcript of evidence for adequate appellate review, as all the evidence relative to it and necessary for review was attached to and made part of Bills Nos. 1 through 7. Bill No. 8 was refused

not because of the lack of a transcript, but because it was a mere reiteration of the complaints made in Bills Nos. 1 through 7. Where a bill of exceptions reserved to the denial of a new trial presents nothing that was not passed on by the trial judge in his rulings on bills reserved during the course of the trial, the appellate court will not consider it as presenting anything new. *State v. Stracner*, 182 So. 571, 190 La. 457; *State v. Boone*, 195 So. 511, 194 La. 977.

Moreover, the appellate court will not disturb the trial court's denial of a new trial unless the record shows that the state failed to introduce any evidence of a fact essential to conviction. *State v. Xenos*, 138 La. 113, 70 So. 55.

If the record on appeal shows that there is some testimony adduced at the trial to support the conviction, no matter how little, the appellate court is without power to pass upon the question whether the evidence adduced was sufficient to support the verdict of guilty. *State v. Singley*, 195 La. 519, 197 So. 218; *State v. Lassiter*, 198 La. 742, 4 So. 2d 814; *State v. Barbarian*, 225 La. 89, 72 So. 2d 306. Louisiana Constitution Article VII, Section 10.

Hence, in the case at bar, all that the appellate court could pass upon with reference to Bill of Exceptions No. 8 was whether there was some evidence in the record to support the conviction.

In the case at bar, the evidence attached to and made part of bills of Exceptions Nos. 1 through 7 showed affirmatively that there was some evidence

introduced on the trial of the essential elements of the crime of which the defendant was convicted.

Inasmuch as there already was *some* supporting evidence in the record before the appellate court, a complete transcript was unnecessary in order to review defendant's complaint that there was a complete lack of supporting evidence in the record. In other words, it was apparent from the record in the possession of the appellate court that the record contained some evidence to support the conviction, and that a complete transcript could have added nothing. A complete transcript was irrelevant, as the question of insufficiency of evidence is not appealable.

In the case at bar, the furnishing of a complete transcript being a vain and useless thing and serving no purpose, the defendant was not entitled thereto. *Kirkendoll v. People*, 331 P. 2d 809; *Petition of Patterson*, 317 P. 2d 1041, wherein the court said:

> "If other matters are apparent from the record which would make the furnishing of a complete transcript a vain and useless thing, the trial court is justified in denying."

IV.

BILL OF EXCEPTION METHOD AFFORDS DEFENDANT SAME RIGHTS ON APPEAL AS COMPLETE TRANSCRIPT

Louisiana uses the bill of exception method because there is no criminal appeal in this state on questions of fact. Regardless of whether the defendant is rich or poor, appellate criminal review is afforded

only on questions of law. Louisiana Constitution Article VII, Section 10.

Therefore, a complete transcript is not necessary in Louisiana to afford effective appellate review. Under the appeal-only-on-law system, it is necessary to preserve for appeal only those facts necessary to explain and support the defendant's objections to the rulings of the trial court on matters of law. This is the purpose of a bill of exceptions: to present questions of law for decision on appeal. L.S.A. 15:498; Comment, 6 La. L. Rev. 453; 24A Corpus Juris Secundum, Verbo Criminal Law, Section 1751 (1), p. 155, Sec. 1753, p. 188. In the perfection of the bill of exceptions for appeal, that portion of the evidence to which the defendant's objection has been directed or is related is transcribed and becomes part of the bill of exceptions. L.S.A. 15:499. *State v. Ella*, 108 La. 553, 32 So. 476, explains the Louisiana "bill of exception" method as follows:

> "The law contemplates the taking down, when an objection shall be made and a bill of exception reserved, 'of the facts upon which the bill has been retained.' . . . This may fairly be interpreted to mean that such testimony shall be taken down as may be necessary to enable this court to understand and properly rule upon the particular objection made and bill reserved, but it affords no support for the proposition that a defendant in a criminal trial may require the clerk or court stenographer to take down all the testimony adduced on behalf of the state in advance of possible objections or bills of exception

to be made and reserved in the course of the trial. *State v. Downs* 50 La. Ann. 694, 23 So. 456; *State v. Judge of Crim. Dist. Ct.*, 104 La. 63, 28 So. 902. And this view of the matter is recognized by counsel for the defendant, who admit that they had no right to have all the testimony for the state taken down."

Louisiana law, in L.S.A. 15:500 repeats this long established rule of Louisiana criminal procedure as follows:

". . . the accused is without right to have taken down any evidence except that which is necessary as a basis for his bill; he cannot require that any evidence be taken down that appertains to guilt or innocence."

Regardless of whether the defendant is rich or poor, Louisiana procedure applies this rule that the defendant may not require all of the testimony to be taken down, but may require only the recording of the facts necessary to support his bills of exception. *State v. Swails*, 226 La. 441, 76 So. 2d 523. *State v. Daley*, Nos. 46, 158-46, 160 Sup. Ct. of Louisiana, Nov. 5, 1962, unreported at this date; 24A Corpus Juris Secundum, Verbo Criminal Law Sec. 1710 (1), p. 35.

Furthermore, even if all the testimony were actually recorded and transcribed, L.S.A. 15:555 prohibits the appellate court from considering any portion thereof which is not a part of a bill of exceptions, as follows:

". . . provided further, that the said testimony shall be considered only in explanation of the

bills of exceptions reserved during the trial on behalf of the accused."

Testimony which is not a part of a bill of exception cannot be considered by the appellate court although it is in the record. *State v. Brown*, 236 La. 562, 108 So. 233; *State v. Cooper*, 241 La. 757, 131 So. 2d 55; *State v. Honeycutt*, 218 La. 362, 49 So. 2d 610, 612; *State v. Haddad*, 211 La. 337, 59 So. 2d 411, 416; *State v. Mastricovo*, 221 La. 312, 59 So. 2d 403.

Therefore, in Louisiana, a defendant with a complete transcript is not afforded a greater right of appeal than a defendant whose record on appeal contains only the testimony which is part of bills of exeeption.

In the recent opinion in *State v. Daley, supra*, the Louisiana Supreme Court, discussing the Louisiana procedure of reporting only that evidence relating to bills of exceptions, said:

"In this Court, defense counsel argue that the denial to appellant of the benefit of a written transcript in a criminal case because he is poor is violative of his fundamental right under the due process and equal protection clauses. . . . Our jurisdiction in criminal cases extends to questions of law alone (see Section 10, Article 7 of the Constitution) for, by Section 9 of Article 19 of the Constitution, the jury in all criminal cases are the judges of the law and of the facts on the question of guilt or innocence 'having been charged as to the law applicable to the case by the presiding judge'. . . . Our law (R.S.

15:498-499, 500, 502, 503 and 555) provides an *adequate means for all persons tried for crime, poor or rich alike, to have a full appellate review on questions of law by this court.*" (Emphasis supplied)

The opinion in the instant case in effect holds that the bill-of-exception method does not place a defendant on an equal footing in his appeal with a defendant who has a complete transcript. If this holding is allowed to stand, the bill-of-exception method will have to be scrapped although it has been recognized as valid under the *Griffin* decision, as affording defendants an effective appellate review.

V.

THE PER CURIAM OF THE TRIAL JUDGE AS TO THE FACTS OF JUROR'S VOIR DIRE IS CONCLUSIVE, AND CORRECTNESS THEREOF WAS ADMITTED BY DEFENDANT

Under the jurisprudence of Louisiana, the trial judge's per curiam is controlling in the absence of evidence to the contrary. *State v. Guin*, 212 La. 475, 32 So. 2d 895; *State v. Burkhalter*, 211 La. 342, 30 So. 2d 112; *State v. Edwards*, 232 La. 577, 94 So. 2d 674; *State v. Martinez*, 220 La. 899, 57 So. 2d 888; cert. den. 73 S.Ct. 58 344 U.S. 843, 97 L. Ed. 656; *State v. McMullen* 223 La. 629, 66 So. 2d 574; *State v. Roy*, 220 La. 1017, 58 So. 2d 323.

L.S.A. 15:504 provides as follows:

"§ 504. Per curiam appended to bill; certification in absence of per curiam

> "Whenever necessary the trial judge shall append to the bill of exceptions a per curiam in order that the appellate court may be fully informed as to all the circumstances pertaining to the questions raised by the bill. If the bill of exceptions requires no per curiam comment, the judge shall so certify at the foot of the bill at the time he signs the same."

When a portion of the transcript of evidence is unavailable, as in the case at bar, the trial judge has authority under L.S.A. 15:504 to supply the unavailable portion by means of a per curiam, which is controlling. This is what was done in the case at bar when the recording machine broke down. This would have occurred whether the defendant was rich or poor. The per curiam supplied the deficiency and "cured" the transcript.

In *Miller v. United States*, 63 S. Ct. 187, 317 U.S. 192, the use of a per curiam in lieu of a verbatim transcript was recognized, as follows:

> "Historically a bill of exceptions does not embody a verbatim transcript of the evidence but on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses, as to what occurred at the trial, and in short from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked."

The remedy of a defendant who does not agree

with the facts stated in the per curiam is to traverse it. If there are any facts stated in a per curiam which are injurious to the defendant or unwarranted, the defendant must remedy same by a motion for a new trial, and on the trial of the motion, he must traverse (produce contrary evidence) the facts stated in the per curiam; otherwise he admits and is bound by the facts stated in the per curiam. *State v. Goodman*, 116 La. 388, 40 So. 771; *State v. Williams*, 213 La. 924, 35 So. 2d 856; 24A Corpus Juris Secundum, Verbo Criminal Law, Sec. 1775, p. 309.

In the case at bar, the defendant made no attempt to traverse the per curiam and in fact accepted same as true and in lieu of the actual transcript by allowing it to go into the record uncontroverted. This principle would apply to this defendant whether he could pay for a transcript or not.

> "When an appellant accepts and files without objection a bill of exceptions which has been qualified by the trial judge, the appellant is bound by the qualification which is controlling." 24A Corpus Juris Secundum, Verbo Criminal Law, Sec. 1775, p. 309.

Defendant's failure to use a known remedy bars his subsequent reliance on the defaulted right. *U. S. v. Morgan*, 74 S.Ct. 247, 346 U.S. 502, 98 L.Ed. 248; *Lawn v. United States*, 78 S.Ct. 311, 355 U.S. 339, 2 L.Ed. 321; *Brown v. Allen*, 73 S.Ct. 392, 344 U.S. 443, 97 L. Ed. 469.

In *State v. Reed*, 180 La. 741, 157 So. 547, relied on in the instant opinion, no per curiam was involved,

and the transcript was so garbled and incomplete that it was impossible for the appellate court to review the objections of the defendant and the rulings of the trial Court. The Louisiana Supreme Court in its opinion, stated:

> "While the judge in this case, pursuant to the request of defendant's counsel, ordered the testimony taken down, the work was so inexpertly done that the record as made up is not in such form as to enable this court to review the objections of defendant and the rulings of the trial judge thereon. . . . And as disclosed on the hearing of the motion for a new trial, some of the bills reserved by the defendant's counsel, together with the testimony, objections, rulings, and reasons; were entirely omitted by the stenographer . . . thereby making it impossible for their validity to be tested on appeal."

In other words, in the opinion of the appellate court, the defendant was denied *effective appellate review* because of the condition of the transcript.

The circumstances in the case at bar are different. The Defendant had in fact a complete transcript before the appellate court on every objection and ruling of which he has complained, and he was afforded effective appellate review on the basis of this record.

VI.

THE COURT ERRED IN APPLYING L.S.A. 15:555 TO THE CASE AT BAR

L.S.A. 15:555 applies only to the testimony of *witnesses on the question of guilt or innocence.*

The right given under the statute to obtain a complete transcript by paying for it applies only to a transcript of evidence given by witnesses *on the question of guilt or innocence.*

In the case at bar, the testimony of the prospective juror would not be covered by L.S.A. 15:555. The juror was not a witness on a question of guilt or innocence. The only statutory provisions for a transcript of the testimony of prospective jurors are R.S. 15:499-502 which provide for the taking of testimony as part of bills of exception. There is NO PROVISION in Louisiana law which gives a defendant with funds a greater right to a transcript of the testimony of prospective jurors than an indigent defendant. Poor and rich are on an equal footing under the provisions of L.S.A. 15:499-504 which are the ONLY articles that apply to the preservation of the testimony of prospective jurors.

State v. Pasternostro, 224 La. 87, 68 So. 2d 767, tried in the Cirminal District Court for the Parish of Orleans, has no application to the case at bar because it was decided under R.S. 13:1373(B), a special statute which applies only to the Parish of Orleans, requiring a complete transcript of the testimony taken in criminal cases in Orleans Parish ONLY. The case at bar is not affected by the Orleans Parish statute as the crime was committed in another parish, to which R.S. 13:1373 (B) does not apply. The *Pasternostro* decision specifically stated that L.S.A. 15:555

"is without application to trials in the Criminal

District Court for the Parish of Orleans." 68 So. 2d 768.

Therefore, the *Pasternostro* decision is not authority for the proposition stated by the court in the instant opinion, that the right given under L.S.A. 15:555 is enforceable by mandamus. The *Pasternostro* case did not involve L.S.A. 15:555, but was decided under L.S.A. 13:1373(B).

VII.

THE COURT ERRED IN APPLYING THE GRIFFIN DECISION TO THE CASE AT BAR

The *Griffin* decision is controlling only if the defendant herein was prevented from obtaining an effective appellate review merely and solely because he was an indigent defendant who was unable to purchase a complete transcript of the evidence.

In order for strong local interest in the enforcement of criminal law to be subjected to the federal counterbalance of the general ideal of fundamental equality under the *Griffin* decision, it must appear that the defendant's financial situation, and that alone, denied him adequate appellate review of the prejudicial error.

Not only has the defendant failed to show any reversible error which was denied adequate appellate review because of the lack of a complete transcript, but he has also failed to show any relation between his financial condition and his failure to obtain a complete transcript.

The court erred in stating that the principal contention made by defendant in his appeal to the Louisiana Supreme Court *as an indigent defendant* was his inability to procure a complete transcript of the trial proceedings.

The defendant has never made a showing of indigency.

The defendant reserved nine bills of exception, which are the only matters that could be passed upon by the appellate court. L.S.A. 15:498, 499, 500, 502.

Not one of these bills involved any claim of defendant's indigent state and his inability to procure a complete transcript because of his indigence. Not one of the bills of exception shows the necessity for a complete transcript. *State v. Weston*, 232 La. 766, 95 So. 2d 305. This point was never raised by the defendant in his appeal to the Louisiana Supreme Court.

The defendant did not give the Louisiana Supreme Court a chance to pass upon the question of his right to or the necessity for a complete transcript.

Failure to raise a known and existing question of unconstitutional proceedings or action bars subsequent objection to conviction on the grounds. *Brown v. Allen*, 73 S.Ct. 392, 419, 421, 422; 344 U.S. 443, 97 L. Ed. 469, wherein the court said:

> "Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at the state trial and used later to support

> habeas corpus. State criminal proceedings would be unreasonably hampered. . . . The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. *It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States.* 28 U.S.C.A. Sec 2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal. To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime."

Although the federal court might be of the opinion that the furnishing of a complete transcript of the evidence is preferable to the "bill of exception" method used in Louisiana, it should not for this reason subvert the entire system of Louisiana criminal procedure. It should exercise its jurisdiction in the matter only if the defendant has actually been deprived of a right and treated unequally because of his poverty.

In the case at bar no question is presented under the principle of *Griffin v. Illinois*, if the defendant's complaint is that he was not given a complete transcript because the recording machine broke down. The defendant's poverty did not prevent him from securing a complete transcript on appeal. Defendant's poverty had nothing to do with the breaking down of the recording machine during one juror's examination; nor did defendant's poverty cause his own failure to traverse the per curiam on the juror's statements.

Under the circumstances presented in the case at

bar, Louisiana law accorded the defendant the same rights regardless of whether he was rich or poor.

The *Griffin* decision being based on the distinction between rich and poor made by a state law, is inapposite here.

CONCLUSION

In conclusion it is submitted that this Honorable Court has either misunderstood the ruling in the *Griffin* case or has unintentionally misapplied the effect of this decision to the Louisiana procedure for appeals in criminal matters as provided for by R.S. 15:499-504.

To apply the ruling in the *Griffin* case to the case at bar would have the effect of declaring Section 10, Article VII of the Constitution of Louisiana unconstitutional. This we do not think is the desire or intent of this Honorable Court. Accordingly it is submitted that the opinion of this Honorable Court is in error and that a rehearing should be granted.

Respectfully submitted by:

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

SCALLAN E. WALSH,
Assistant Attorney General.

TEDDY W. AIRHART, JR.,
Assistant Attorney General.

THOMAS W. McFERRIN,
Special Counsel.

DOROTHY W. WOLBRETTE,
Assistant Attorney General
of Counsel.

CERTIFICATE OF COUNSEL

I, Scallan E. Walsh, Attorney for Maurice Sigler, Warden of the Louisiana State Penitentiary, do hereby certify that the foregoing petition for a rehearing of this cause is in good faith and not merely for purpose of delay. I further certify that a copy of same has this day been forwarded to Joel B. Dickerson, Esquire, Attorney for Relator, by mailing a copy of same to him through the United States Mail, postage prepaid, at his office at 326 St. Ferdinand Street, Baton Rouge, Louisiana.

Baton Rouge, Louisiana, this _____ day of November, 1962.

SCALLAN E. WALSH
Assistant Attorney General

APPENDIX NO. III-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19402

UNITED STATES OF AMERICA,
EX REL EMILE WESTON, JR.,
Appellant,

v.

MAURICE SIGLER, WARDEN,
LOUISIANA STATE PENITENTIARY
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(Dec. 20, 1962)

ON PETITION FOR REHEARING

Before CAMERON and JONES, Circuit Judges, and DeVANE, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

Cameron, Circuit Judge, Dissenting.

APPENDIX IV-A

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1962

No.....

UNITED STATES OF AMERICA,
EX REL EMILE WESTON, JR.,

Petitioner,

v.

MAURICE SIGLER, WARDEN
LOUISIANA STATE PENITENTIARY, Et al,

Respondents.

Motion for Extension of Time Within Which to File Petition for Writ of Certiorari and Certificate of Probable Cause

To the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States:

Respondents move that the time within which he may file a petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit Court, entered on the 23rd day of October, 1962, rehearing refused on December 20, 1962, in the cause pending therein entitled, United States of America, Ex Rel, Emile Weston, Jr., Petitioner, versus Maurice Sigler, Warden, Louisiana State Penitentiary, Et al, Respondents, be extended from the 20th day of January, 1963 to and including the 20th day of February, 1963.

OPINIONS BELOW

The judgment of the Circuit Court of Appeals is unreported. A copy of said judgment is attached to this petition as Exhibit (A).

The judgment of the Circuit Court of Appeals refusing a rehearing is unreported; a copy of this opinion is attached to this petition as Exhibit (B) of the appendix to the petition.

STATEMENT OF THE CASE

On June 18, 1956, Emile Weston was indicted for aggravated rape. On October 17, 1956, after a full trial by jury he was convicted and sentenced to death. His conviction and sentence was affirmed on appeal to the Supreme Court of Lousiana. *State v. Weston* 232 La. 766, 95 So. 2nd 305. A writ of habeas corpus was sought from the United States District Court for the Eastern District of Louisiana. The application was denied for the reason that state remedies had not been exhausted. The Court of Appeals for the Fifth Circuit affirmed. *Weston v. Sigler, Warden,* 262 F. 2nd 519. On certiorari the Supreme Court vacated the judgment of the Fifth Circuit Court and remanded the case to the district court with instructions to hear on the merits the application of Weston for a writ of hapeas corpus. *Weston v. Sigler, Warden,* 361 U.S. 37, 80 S. Ct. 141, 4 L. Ed. 2nd 111. The district court heard the application and denied same. The matter was then appealed to the Court of Appeals for the Fifth Circuit and that Court reversed the district court and remanded the case for the reason that, according

to the Court, Weston did not have on appeal the benefit of a complete transcript citing as its authority *Griffin v. Illinois*, 351 U.S. 12, 76S. Ct. 585, 100 L. Ed. 891, 55 A.L.R. 2nd 1055, and *Eskridge v. Washington Prison Board*, 357 U.S. 214, 78 S. Ct. 1061, 2 L. Ed. 2nd 1269. Respondents applied for a rehearing which was denied on December 20, 1962. The matter is now before this Court on an application for a writ of certiorari filed by the Respondents.

QUESTIONS PRESENTED

First: Under Louisiana law relative to appeals in Criminal cases is it a violation of due process under the Fourteenth Amendment to fail to give an indigent defendant a complete transcript of the testimony, when, under the Constitution of Louisiana, the Supreme Court may only consider questions of law and not those of fact, and especially so when Louisiana Revised Statutes Title 15:499-503 provides a method whereby errors of law may be brought before the Supreme Court?

Second: Must a State provide an indigent defendant a transcript of the entire testimony and each and every incident of trial when same would not even be available to a person who could afford such a transcript when there are other means of affording to every defendant, indigent or otherwise, adequate review?

Third: Is a defendant in every instance entitled to a complete transcript even when he has shown no reversible error which lacked adequate review by the appellate Court?

Fourth: Is a complete transcript necessary to afford effective appellate review under the appeal-only-on law system whereby defendant's objections to the ruling of the Court on questions of law are presented by bills of exception?

Fifth: Is a complete transcript of evidence necessary when under Louisiana Revised Statutes 15:504 the trial judge has authority to supply any unavailable portion by means of a per curiam, which is controlling?

Sixth: Is a complete transcript of the testimony necessary on questions of guilt or innocence when those matters are not passed upon by the appellate court and especially the testimony of a prospective juror whose testimony may be brought up by a bill of exception?

Seventh: Under the ruling of the Griffin decision must it not be shown that the defendant was prevented from obtaining an effective appellate review merely and solely because he was an indigent defendant who was unable to purchase a complete transcript of the evidence?

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on October 23, 1962. The Judgment of the Circuit Court of Appeals refusing a rehearing was rendered on December 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

REASONS WHY EXTENSION OF TIME IS JUSTIFIED

1. This matter presents a serious question involving the decisions of this Honorable Court in the case of *Griffin v. Illinois* 351 U.S. 12, 76 S. Ct. 585,

100 L. Ed 891, 55 A.L.R. 2d 1055, and *Eskridge v. Washington Prison Board*, 357 U.S. 214, 78 S Ct. 1061, 2 L. Ed. 2d 1269, as applied to the statutes of the State of Louisiana relative to appeals in criminal cases, being L.R.S. 15:499-503, and Louisiana Constitution Art. 7, Section 10.

2. That decision of the Court of Appeals for the Fifth Circuit refusing a rehearing was rendered on December 20, 1962, and because of the many holidays for the Christmas Season and New Years, mover has not had the benefit of thirty full working days within which to properly prepare the petition for a writ of Certiorari and the accompanying documents and transcript of the record to be attached thereto and especially so due to the large amount of work which accumulated in the office during said holiday season.

3. That the opinion of the Court of Appeals for the Fifth Circuit rendered on October 23, 1962, clearly misinterprets and misapplies the rule laid down by this Court in the *Griffin* case to the situation presented in the case at bar.

4. That because of the importance of this question to the State of Louisiana a certificate of probable cause should issue herein.

Respectfully submitted,

By:

JACK P. F. GREMILLION
Attorney General

SCALLAN E. WALSH
Assistant Attorney General

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

Case No......

UNITED STATES OF AMERICA
EX REL EMILE WESTON

v.

MAURICE SIGLER, WARDEN, LOUISIANA
STATE PENITENTIARY, ET AL

ORDER

The attached application considered;

IT IS ORDERED that a certificate of probable cause is hereby granted to Maurice Sigler, Warden, Louisiana State Penitentiary, to appeal for a writ of certiorari, to the judgment of the Court of Appeals for the Fifth Circuit dated October 23, 1962, rehearing refused December 20, 1962, reversing the judgment of the United States District Court for the Eastern District of Louisiana.

IT IS FURTHER ORDERED that the execution of Emile Weston, Jr., presently incarcerated in the Louisiana State Penitentiary be and is hereby stayed pending the disposition of this cause and until further orders of this Court.

Washington, D.C., this ___ day of January, 1963.

Associate Justice
Supreme Court of the United States

APPENDIX No. IV-B

SUPREME COURT OF THE UNITED STATES

No.....

(OCTOBER TERM, 1962)

MAURICE SIGLER, WARDEN, ET AL.,
Petitioners,

v.

EMILE WESTON, JR.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 18th, 1963.

(S) HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 16th day of January, 1963

CERTIFICATE OF COUNSEL

I, Jack P. F. Gremillion, a member of the bar of the U. S. Supreme Court, Attorney for Maurice Sigler, Warden of the Louisiana State Penitentiary, do hereby certify that the foregoing petition for a Writ of Certiorari in this cause is in good faith and not merely for purpose of delay. I further certify that a copy of same has this day been forwarded to Joel B. Dickerson, Esquire, Attorney for Relatoi by mailing a copy of same to him through the United States Mail, postage prepaid, at his office at 326 St. Ferdinand Street, Baton Rouge, Louisiana.

Baton Rouge, Louisiana, this——day of February, 1963.

Jack P. F. Gremillion
Attorney General

2865-B, 2-63